Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the	)	GN Docket No. 00-185
Internet Over Cable and Other Facilities	)	
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband	)	CS Docket No. 02-52
Access to the Internet Over Cable Facilities	)	

COMMENTS OF THE MEDIA INSTITUTE

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I. INTRODUCTION

The Media Institute (TMI) is a nonprofit research foundation specializing in communications policy and First Amendment issues. TMI has long advocated a robust and dynamic press, a strong First Amendment, and a competitive communications industry. TMI submits these Comments in response to the Commission's Declaratory Ruling

and Notice of Proposed Rulemaking regarding the provision of broadband access to the Internet over cable facilities.[1]

The Notice seeks comment on the regulatory implications of the Commission's determination that cable modem service is an "interstate information service."[2] Chief among these implications is the relationship between cable operators and Internet service providers (ISPs) and, more specifically, "whether it is necessary or appropriate at this time to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly (what we refer to hereafter as 'multiple ISP access')."[3] As the Notice properly recognizes, however, any contemplated regulation must be conditioned upon an examination of "the scope of the Commission's jurisdiction to regulate cable modem service, including whether there are any Constitutional limitations on the exercise of that jurisdiction."[4] These comments will address the First Amendment issues raised in the Notice.

II. MANDATED MULTIPLE ISP ACCESS AND THE FIRST AMENDMENT

A. Regulation of ISP Access Would Be Content Based

The constitutionality of any regulation implicating speech is assessed by subjecting it to one of two levels of scrutiny: "strict scrutiny," reserved for regulations that restrict speech on the basis of its content; and "intermediate scrutiny," applied to "content-neutral" regulations that impose only an incidental burden on speech.[5] Thus, content becomes a key factor in discussing the constitutionality of any regulatory scheme for cable modem service. Providing broadband Internet access over cable is clearly a content-based activity. As the Commission has acknowledged: "Internet access services ... alter the format of information through computer processing applications such as protocol

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[1] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking,* FCC 02-77 (rel. March 15, 2002) ("Notice").
[2] *Id*. at paras. 7, 33.
[3] *Id*. at para. 72.
[4] *Id*.
[5] *See United States v. O'Brien,* 391 U.S. 367, 377 (1968) (announcing four-part test for regulations subject to intermediate scrutiny).

conversion and interaction with stored data."[6] Furthermore, "Congress has defined the term 'Internet access service' to mean: 'a service that enables users to access content, information, electronic mail, and other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.'"[7]

The technological characteristics of high-speed (or broadband) Internet access can, in themselves, affect the type and quality of content reaching subscribers. For example, subscribers with broadband cable access can "utilize more sophisticated 'real-time' applications [*e.g.*, live voice or video communications], and view streaming video content at a higher resolution and on a larger portion of their screens than is available via narrowband."[8] Moreover, broadband cable subscribers will typically be offered a "first screen" or "home page" and the option of creating a personal Web page -- although subscribers are free to substitute a first screen of their own choosing.[9] This first screen is the ISP's first opportunity to communicate with its subscribers. In addition, some cable broadband ISPs (such as Road Runner) provide targeted content to their subscribers via an Intranet, or private network of stored content.[10]

Moreover, a cable operator's selection of broadband Internet service has content implications. A cable operator wishing to offer broadband Internet access can choose to contract with an unaffiliated ISP, or use an ISP in which the operator has an interest. The decision to select one ISP and forego others is made for a number of reasons, including obvious financial ones -- but one significant consideration is content. All ISPs by definition offer Internet access, and some offer a package of interactive services in addition to a unique compilation of news, features, graphics, and ads for their home page. This content, in the form of services and information, may give an ISP a unique "identity" that makes it attractive to subscribers and in turn to cable operators. A cable operator's decision to choose one ISP over another is, to a degree, editorially related -- it is not merely a

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[6] *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress,* 13 FCC Rcd. 11501, 11516-17, para. 33 (1998) (citations and internal quotations omitted), quoted in Notice, *supra* note 1 at para. 1, n.2.
[7] 47 U.S.C. Sec. 231(e)(4), quoted in Notice, *id.*
[8] Notice, *supra* note 1 at para. 10 (citations omitted).
[9] *Id*. at para. 18, n.83.
[10] *Id*. at para. 10, n.41.

financial decision to purchase an easily substitutable commodity like long-distance phone service. Therefore, a cable operator exercises editorial choice in the selection of an Internet access service just as it exercises editorial choice in its selection of program channels. The Commission's decision to classify broadband cable modem service as an "interstate information service" rather than as a "telecommunications service" (*i.e.*, a common-carrier provider of conduit only) recognizes the content-oriented nature of the service, implicit in which is the concept of editorial discretion.

B. There Is No Information Bottleneck With Cable Broadband Service

A significant feature of cable modem service is that, while cable operators do provide some content of their choosing directly to subscribers via the ISP (*e.g.*, a home page or first screen and a package of interactive services), "cable operators do not control the majority of information accessible by cable modem subscribers."[11] Indeed, beyond offering a "portal" site with a compilation of proprietary content, the ISP's primary attraction is that it offers access to the vast information resources of the Internet and to the millions of Web sites available on the World Wide Web.

Moreover, the subscriber is not even obligated to view the proprietary content or to use the services furnished by the ISP. "Click-through" access makes it possible for the subscriber to by-pass those features and obtain them from other sources. Web browsing and e-mail are good examples of services that are widely available from a variety of sources.[12] The subscriber can even substitute a home page or first screen from a different source.[13] In effect, then, the subscriber is under no obligation to view the content provided by the ISP, and in fact has access to other content on the Internet -- a virtually unlimited supply that is, in the words of the U.S. Supreme Court, "as diverse as human thought."[14] Thus, cable modem service presents no information bottleneck, and cable operators serve no "gatekeeper" function as they do when providing traditional cable programming on a fixed number of channels.

[11] *Id*. at para. 62.
[12] *Id*. at para. 25, n.112.
[13] *Id*.

C. There Is No "Must-Carry" for ISPs Comparable to "Must-Carry" for Broadcast Stations

This "information bottleneck" and "gatekeeper" distinction is important in our First Amendment analysis. Some have suggested that, in the debate over cable carriage, ISPs are analogous to broadcast stations. Therefore, the argument goes, a cable system offering Internet access should be required to make available multiple ISPs from which the consumer can choose, just as cable systems are required under "must-carry" statutory provisions to make available certain local broadcast signals. The argument, however, is flawed.

Must-carry for broadcast stations is premised on the assumption that, in the absence of mandated carriage, cable operators would not carry these stations and thus their subscribers would be deprived of these "voices." Moreover, the lack of carriage would place these stations in such financial jeopardy that many of them would be forced out of business, thus reducing diversity in free over-the-air television available to all. The Supreme Court addressed the must-carry issue in *Turner I* (1994)[15] and *Turner II* (1997).[16] The Court wrestled with two competing First Amendment claims: the right of media speakers (*i.e.*, cable operators) to exercise unfettered editorial discretion in selecting the programming content offered to subscribers; and the right of the individual to receive information from a multiplicity of sources. The Court decided in *Turner I* that must-carry for local broadcast stations was a content-neutral regulation that did not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[17]

As a content-neutral regulation, must-carry was subject only to intermediate scrutiny under the First Amendment. For the regulation to withstand this scrutiny, the government had to show that must-carry furthered substantial governmental interests unrelated to the suppression of speech and did not burden substantially more speech than necessary to further those interests.[18] The government cited three related interests: (1) pre-

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[14] *Reno v. ACLU,* 521 U.S. 844 (1997).
[15] *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994) ("*Turner I*").
[16] *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997) ("*Turner II*").
[17] *Turner I,* 512 U.S. at 643.
[18] *See United States v. O'Brien, supra* note 5.

serving the benefits of free, over-the-air television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the television programming market.[19]

The Court acknowledged these interests as substantial and concluded that the must-carry regulation survived intermediate scrutiny. Essentially, then, the Court resolved the First Amendment tension by placing the right of consumers to receive information above the right of media speakers to exercise editorial discretion. A key element in this decision was the Court's finding that cable television created a "bottleneck" in the free flow of information reaching subscribers, and that cable operators were "gatekeepers" of that information flow. This "bottleneck monopoly" power threatened the "viability of broadcast television," the Court feared.[20] Thus, the Court reasoned that the carriage practices of cable operators could be regulated in substantial measure as long as such regulation furthered the First Amendment right of individuals to receive information.

As we noted above, however, cable ISPs do not create an information "bottleneck" or serve as "gatekeepers" by limiting access to information. They do not even require subscribers to view their proprietary content or use their interactive services -- on the contrary, they facilitate access to the "multiplicity of sources" that is the World Wide Web. Moreover, consumers can access the Internet through other technologies such as telephone line (narrowband) as most currently do, DSL wireline (broadband), or increasingly through wireless means. Clearly cable operators have no "bottleneck monopoly" over Internet access.

Furthermore, must-carry for broadcast stations applies to virtually all cable systems in the United States. However, any Commission regulation mandating multiple ISP access for cable would apply only to those cable systems that choose to offer a broadband Internet service. Nor would such a regulation apply uniformly to all Internet access providers -- *i.e.*, those using other technologies, such as phone companies. This differential treatment would discriminate against certain cable operators (those offering Internet ac-

[19] *Turner I,* 512 U.S. at 662.
[20] *Id*. at 661.

cess) on the basis of their content, and would place an unfair competitive burden squarely upon them.

For all of these reasons, multiple ISP access for cable broadband bears no conceptual or practical similarity to cable must-carry for broadcast television signals. As a result, the Supreme Court's rulings in *Turner I* and *Turner II* upholding the constitutionality of the must-carry rule for broadcast signals can find no applicability in the present discussion of cable ISPs.

D. A Multiple ISP Access Requirement Would Likely Be Subject to Strict Scrutiny

The Notice seeks comment on "the level of First Amendment scrutiny that would apply to a federal multiple ISP access requirement."[21] Our analysis thus far suggests that strict scrutiny would be the appropriate level of review for the following reasons:

(1) Providing broadband Internet access over cable is clearly a content-based activity. Cable operators choose one ISP over another for reasons of content -- the unique compilation of proprietary information, plus the package of interactive services, that an ISP can offer the operator's subscribers. Choosing an ISP therefore involves the cable operator's editorial discretion, just as in choosing a lineup of program channels.

(2) Cable operators have no "bottleneck monopoly" or "gatekeeper" role in the realm of Internet access. That is, cable broadband ISPs impose no limits on the information that a subscriber can receive, and are just one of several means by which consumers can access the Internet. A lack of cable carriage would pose no threat to the viability of the ISP industry generally, akin to the threat the Supreme Court found to over-the-air broadcasting. Thus, there would be no significant reduction in information dissemination that would implicate the First Amendment right of individuals to receive information. Absent that concern (which was central to the *Turner* decisions), the First Amendment right of the cable operator to exercise editorial control over the selection of content (including the selection of an ISP as a part of the operator's overall "content package") must take precedence.

[21] Notice, *supra* note 1 at para. 80.

In addition, the argument advanced by District Judge MiddleBrooks in the *Broward County* case[22] -- that a mandatory access regulation for cable ISPs falls within the First Amendment parameters of *Miami Herald v. Tornillo*[23] -- is persuasive. In *Tornillo*, the editorial discretion of the Miami Herald was compromised by a Florida law that mandated a right of reply for political candidates who were attacked by the newspaper. Without such a law, proponents argued, the public had no means to make its voice heard in print or to participate in political debate, owing to the media concentration and entry costs that limited the diversity of print voices.

"The Supreme Court unanimously rejected these arguments finding that an enforceable right of access brings about a direct confrontation with the express provisions of the First Amendment," Judge MiddleBrooks noted.[24] He went on to explain the *Tornillo* Court's reasoning:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper ... constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press....[25]

As Judge MiddleBrooks concluded: "It is ironic that a technology, which is permitting citizens greater ease of access to channels of communication than has existed at any time throughout history, is being subjected to the same arguments rejected by the Supreme Court in *Tornillo*."[26] It is hard to imagine how a federally mandated access regulation for cable ISPs could avoid running afoul of *Tornillo*. Such a regulation could not withstand strict scrutiny and, like the Broward County ordinance, would necessarily be overturned on First Amendment grounds.

E. A Multiple ISP Access Requirement Would Not Withstand Intermediate Scrutiny

If a court were, for some reason, to subject a federally mandated access regulation to intermediate rather than strict scrutiny, the result would be the same. For a regulation

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[22] *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida,* 124 F. Supp. 2d 685 (S.D. Fla. 2000).
[23] *Id*. at 694, citing *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241 (1974).
[24] *Id*. at 694.
[25] *Id*., quoting *Tornillo,* 418 U.S. at 258.

to withstand intermediate scrutiny, the government must show that the harm it seeks to prevent is real, not merely conjectural, and that the regulation will alleviate the harm in a direct and material way.[27] In the instant matter, the "harm" alleged is that cable subscribers will be denied the ISP of their choice unless mandatory access is enforced. The Commission would have to demonstrate that this "harm" really exists, and that the benefits of a mandated access regulation would outweigh the burden on cable operators.

Given the technological realities of cable broadband discussed earlier, however, this "harm" appears non-existent. "Click-through" access gives subscribers access to all material on the Internet, including Web browsers and e-mail services offered by other ISPs.[28] Gaining access to the Internet through a particular access provider does not obligate one to view that provider's content or to use its services -- as we noted earlier, subscribers can even replace the access provider's first screen or home page with one of their own choosing. The courts have long recognized that minor inconveniences to individuals are far outweighed by the preservation of First Amendment freedoms.[29] Making one extra click to reach the ISP of their choice is an insignificant burden on subscribers, compared to the very significant burden on an access provider's facilities -- and editorial discretion -- imposed by a regulation mandating multiple ISP access. In short, multiple access already exists in practice (with an extra click). Thus, there is no real harm to be alleviated. For this reason, no multiple ISP access regulation could withstand even intermediate scrutiny.

III. THE COMMISSION'S AUTHORITY TO REQUIRE MULTIPLE ISP ACCESS

A. Cable ISPs Would Fall Under the Commission's "Ancillary Authority" at Best

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[26] *Id*. at 694.
[27] *See Edenfield v. Fane,* 507 U.S. 761, 770-71 (1993).
[28] Notice, *supra* note 1 at para. 25.
[29] *See, e.g., Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 880, 883 (S.D.N.Y. 1968) (the "short, though regular, journey from mail box to trash can ... is an acceptable burden" upon individuals receiving unsolicited advertising mail); *Cohen v. California,* 403 U.S. 15, 21 (1971) (recipients of objectionable mailings may "effectively avoid further bombardment of their sensibilities simply by averting their eyes"); *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 73 (1983) (mail ads for prophylactics, while possibly unwelcome, are constitutionally protected commercial speech). *See also Universal City Studios, Inc. v. Corley,* 2001 U.S. App. LEXIS 25330 (2nd Cir. Nov. 28, 2001) (fair use of copyrighted material does not guarantee a right to copy "by the optimum method or in the identical format of the original").

We turn now to the issue of the Commission's authority to impose any type of multiple ISP access regulation for cable. The Communications Act does not make specific reference to "cable modem service" or "interstate information service." But, as the Notice points out, "Federal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority."[30] That statutory authority is broad, encompassing "all interstate and foreign communication by wire or radio."[31]

The Notice asks for comment on which "explicit statutory provisions, including expressions of congressional goals" might be furthered by asserting its ancillary authority over cable modem service.[32] The Notice lists several and implies that the Commission's basic purpose, "to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," may be sufficient.[33]

However, we urge the Commission to weigh its ancillary authority over cable modem service with a great degree of caution. We urge this because there are at least two statutory references that would argue against the exercise of authority for the purpose of regulating multiple ISP access for cable: to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[34]; and to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "*regulatory forbearance*, measures that promote competition or other regulating methods that remove barriers to infrastructure investment."[35] Statutory language clearly recognizes that there are circumstances involving Internet and interactive services where the public is best served by the government taking a hands-off approach. Since both of these references are Internet specific, as opposed to more general references to "wire and radio

[30] Notice, *supra* note 1 at para. 75, citing *United States v. Southwestern Cable Co.,* 392 U.S. 157, 178 (1968).
[31] *Id*. at para. 75, quoting Communications Act Sec. 2(a), 47 U.S.C. Sec. 152(a).
[32] *Id*. at para. 79.
[33] *Id.,* quoting Communications Act Sec. 1, 47 U.S.C. Sec. 151.
[34] *Id*. at para. 73, quoting Communications Act Sec. 230(b)(2), 47 U.S.C. Sec. 230(b)(2) (emphasis added).

communication,"[36] we would urge the Commission to regard them as important guidance in determining how to proceed.

B. The Commission's Ancillary Authority Will Be Subject to Careful Judicial Scrutiny

It is also worth remembering that the courts have viewed the Commission's ancillary authority with more than a little circumspection. The U.S. Court of Appeals for the Eighth Circuit ruled that a Commission regulation requiring cable systems with 3,500 or more subscribers to offer a "significant" amount of locally originated programming exceeded the Commission's ancillary authority.[37] The Supreme Court reversed that judgment in *Midwest Video I*,[38] but Chief Justice Burger was moved to note: "Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."[39] In *Midwest Video II*, the Supreme Court agreed with the Eighth Circuit that a Commission rule mandating public, educational, local governmental, and leased access cable channels exceeded the Commission's ancillary authority.[40] The Court noted that the Communications Act gave the Commission "wide latitude in its supervision over communication by wire"; nonetheless, the Court said, "the Commission was not delegated unrestrained authority."[41]

In view of the above, we urge the Commission to tread lightly in considering its jurisdiction to regulate cable access for multiple ISPs. The Commission would be exercising ancillary authority at best, in an area (Internet services) where statutory language specifically suggests a hands-off approach. The gravity of the matter is enhanced because Commission action in this regard would implicate the First Amendment, prompting the likelihood of a constitutional challenge.

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[35] *Id*. at para. 73, quoting Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, Sec. 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. Sec. 157 (emphasis added).
[36] This language, found at 47 U.S.C. Sec. 152(a), dates to the pre-Internet era of the Communications Act of 1934.
[37] *Midwest Video Corp. v. United States,* 441 F.2d 1322 (8th Cir. 1971).
[38] *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972) ("*Midwest Video I*").
[39] *Id*. at 676, Burger, C.J., concurring.
[40] *United States v. Midwest Video Corp.,* 440 U.S. 689 (1979) ("*Midwest Video II*").
[41] *Id*. at 706.

IV. CONCLUSION: MANDATED MULTIPLE ISP ACCESS IS NEITHER NECESSARY NOR APPROPRIATE

We conclude that mandated multiple ISP access for cable is neither necessary from a practical standpoint, nor appropriate from a constitutional standpoint.

The First Amendment is clearly implicated here because providing broadband Internet access over cable is a content-based activity. The technological characteristics of broadband have an effect on the type and quality of content reaching subscribers, and a cable operator's selection of ISP is a content-driven act of editorial discretion. Unlike regular cable service, however, there is no real or potential "information bottleneck monopoly" of the sort identified by the *Turner* Courts.[42] In fact, cable broadband subscribers are free to disregard the content and services offered by their cable ISP and to use that Internet access to obtain content and services from other online sources.

As a result, there is no First Amendment tension between the right of a cable operator to exercise editorial discretion and the right of a cable broadband subscriber to receive information from a multiplicity of sources. Nor would a lack of cable carriage threaten the viability of the ISP industry, since other platforms are available. Therefore, there would be no need to impose "must-carry" regulation here as the Supreme Court did for those reasons in the *Turner* cases. There is no analogy between broadcast stations and ISPs when it comes to cable carriage.

Given the content-based nature of the cable operator/ISP relationship, any regulation mandating multiple ISP access would be subject to strict scrutiny under a *Tornillo* analysis. As Judge MiddleBrooks ruled in *Broward County*,[43] such a regulation could not withstand strict scrutiny. Neither could such a rule survive intermediate scrutiny, since there is no real harm to be corrected by multiple ISP access. "Click-through" access gives cable subscribers access to the entire Internet, negating any perceived "harm," *i.e.*, that access to information is restrained by a single ISP. The Commission would face a daunting task in demonstrating that such a "harm" existed, and that the benefits of a mandated access regulation outweighed the burden on cable operators.

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[42] *See supra,* note 19.
[43] *See supra,* notes 21, 22.

Regarding statutory authority, the Notice acknowledges that the Commission's authority to mandate multiple ISP access would be "ancillary" to other statutory provisions.[44] However, we note that at least two such provisions suggest a hands-off regulatory approach to Internet services (*i.e.*, references to "unfettered by Federal and State regulation" and "regulatory forbearance").[45] Moreover, challenges to the Commission's ancillary authority have reached the Supreme Court, which refused to support that authority in *Midwest Video II*.[46] Given the tenuous nature of this authority, and the fact that constitutional issues are implicated here, we would urge the Commission to take a restrained approach to the exercise of ancillary authority regarding cable modem service.

In conclusion, there is no need to mandate multiple ISP access for cable because subscribers under current arrangements already enjoy virtually unlimited access to information on the Internet. Any such regulation would fail a First Amendment challenge, under either strict or intermediate scrutiny. Furthermore, at this early stage when technology is still developing -- and absent a compelling need -- an unnecessary regulatory burden could hamper the development of broadband services. Therefore, we strongly urge the Commission not to take any regulatory action to mandate multiple ISP access for cable.

Respectfully submitted,

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[44] Notice, *supra* note 1 at paras. 75-79.
[45] *See supra,* notes 33, 34.
[46] *See supra,* note 39.

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